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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

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7 MARIO ESCOBEDO-GONZALEZ,

Case No. 2:15-CV-1687 JCM (PAL)

8 Plaintiff(s),

9 v.

10 JOHN KERRY, et al.,

11 Defendant(s).  
12

13 **AMENDED ORDER<sup>1</sup>**

14 Presently before the court is plaintiff's motion to reconsider and request for oral argument.  
15 (ECF No. 28). The government responded (ECF No. 30) to which plaintiff replied (ECF No. 33).

16 Also before the court is the government's motion to reconsider (ECF No. 32). The plaintiff  
17 responded (ECF No. 34) to which the government replied (ECF No. 39).

18 **I. Facts**

19 On January 23, 1987, the United States Department of Justice, through the Immigration  
20 and Nationalization Service ("INS"), began removal proceedings against Mario Escobedo-  
21 Gonzalez ("plaintiff"). (ECF No. 13). The INS argued that plaintiff was born in Mexico and not  
22 in Cameron County, Texas, as reported in his birth certificate. (ECF No. 13). The INS claims it  
23 received evidence that the midwife who signed plaintiff's birth certificate was not actually present  
24 during his birth. (ECF No. 18-3). However, the immigration judge ruled in plaintiff's favor,  
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28 <sup>1</sup> This amended order corrects two typographical errors in the original order. (ECF No. 48). There are no substantive changes.

1 finding that INS failed to satisfy its burden to prove, by clear and convincing evidence, that he was  
2 a deportable foreign national.<sup>2</sup> (ECF No. 18-3).

3 After this ruling, plaintiff applied for a passport with the Department of State (“DOS”).  
4 (ECF No. 13). DOS approved plaintiff’s application and issued him a passport on July 21, 1995.  
5 (ECF No. 18-4). Plaintiff applied to renew his passport on March 28, 2005, and DOS issued his  
6 renewal on April 13, 2005. (ECF No. 18-4).

7 On April 7, 2015, plaintiff applied for his second passport renewal. (ECF No. 18-4). On  
8 May 7, 2015, DOS requested plaintiff’s certified birth certificate to prove his citizenship because,  
9 as DOS claims, evidence had surfaced that the midwife who signed his birth certificate was not  
10 present at his birth. (ECF No. 18). Plaintiff, through counsel, responded with a letter and attached  
11 the immigration judge’s opinion which, plaintiff submitted, had resolved the issues with which  
12 DOS was concerned. (ECF No. 18-5). DOS responded with an additional letter again requesting  
13 plaintiff’s birth certificate, or other documentation to prove that plaintiff was born in the United  
14 States. (ECF No. 18-5). Plaintiff did not respond. (ECF No. 18-5). Two months later, DOS  
15 denied plaintiff’s renewal request because plaintiff did not provide his birth certificate, and  
16 because DOS did not believe that plaintiff had proven his citizenship by a preponderance of the  
17 evidence. (ECF No. 18-5).

18 Plaintiff’s amended complaint alleges that DOS wrongfully denied his passport renewal  
19 and asks this court to declare him a United States citizen pursuant to this court’s authority to do so  
20 under 8 U.S.C. § 1503 and 28 U.S.C § 2201. (ECF No. 13).

21 On April 20, 2017, the court denied plaintiff’s motion for summary judgment. (ECF No.  
22 26). Plaintiff subsequently filed a motion for reconsideration and request for oral argument. (ECF  
23 No. 28). Government filed a cross-motion for reconsideration. (ECF No. 32).

## 24 **II. Legal Standard**

25 A motion for reconsideration “should not be granted, absent highly unusual  
26 circumstances.” *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).

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28 <sup>2</sup> The immigration judge stated in dicta that plaintiff had proven that he was a citizen.  
(ECF No. 18-3 at 14).

1 “Reconsideration is appropriate if the district court (1) is presented with newly discovered  
2 evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is  
3 an intervening change in controlling law.” *School Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263  
4 (9th Cir. 1993); LR 59-1. A motion for reconsideration “may not be used to raise arguments . . .  
5 for the first time when they could reasonably have been raised earlier in litigation.” *Kona Enters.,*  
6 *Inc.*, 229 F.3d at 890.

### 7 **III. Discussion**

#### 8 **A. Plaintiff’s motion for reconsideration**

9 In plaintiff’s motion for reconsideration, he raises the following five arguments: (1) “8  
10 U.S.C. § 1252(b)(5)(C) does not apply to the plaintiff”; (2) “the *Chau v. I.N.S.* case does not apply  
11 to the facts of this case”; (3) 8 U.S.C. § 1452(a) does not apply to plaintiff; (4) “issue preclusion  
12 is fully applicable”; and (5) the court should reverse its order (ECF No. 26) based on newly  
13 discovered evidence. (ECF Nos. 28, 33 at 3–7).

#### 14 **1. 8 U.S.C. § 1252(b)(5)(C)**

15 First, plaintiff asserts that “this court’s reliance on 8 U.S.C. 1252 is completely misplaced  
16 because § 1252 deals with orders of removal and plaintiff never received an order of removal.”  
17 (ECF No. 28 at 3). However, the court merely discussed § 1252 as one way, not the only way,  
18 that a “party can raise a defense of citizenship.” (ECF No. 26 at 7). This is was not “clear error”  
19 that would justify a motion for reconsideration. *See Kona Enters., Inc.*, 229 F.3d at 890.  
20 Moreover, even if plaintiff were correct, this point alone would not earn him summary judgment.

#### 21 **2. *Chau v. I.N.S.***

22 Second, plaintiff asserts that the court erroneously quoted or cited *Chau v. I.N.S.*, 247 F.3d  
23 1026 (9th Cir. 2001) for part of its holding. (ECF No. 28 at 4). But the court did not quote *Chau*,  
24 it quoted *Rios-Valenzuela v. Dep’t of Homeland Sec.*, 506 F.3d 393, 396–97 (5th Cir. 2007), and  
25 simply noted that *Rios-Valenzuela* cites *Chau* after the sentence that this court quoted. (ECF No.  
26 26 at 7) (“*Rios-Valenzuela* . . . (citing *Chau*, 247, F.3d at 1027–28)”). *Rios-Valenzuela* simply

1 cites *Chau* in a footnote at the end of the quote that this court included in its order.<sup>3</sup> Not only was  
2 this not “clear error” warranting reconsideration, it was not error at all. *See Kona Enters., Inc.*,  
3 229 F.3d at 890.

4 The only nuance *Chau* adds to the issue of collateral estoppel or issue preclusion here is its  
5 holding that an immigration court is not to decide citizenship when genuine issues of material fact  
6 about citizenship exist. *Chau v. I.N.S.*, 247 F.3d 1026, 1029 (9th Cir. 2001) (“If the petitioner  
7 claims to be a United States citizen and the record presents a genuine issue of material fact as to  
8 the petitioner's nationality, the reviewing court must transfer the proceeding to a district court for  
9 a *de novo* determination.”); *see also* 8 U.S.C. § 1252(b)(5).

10 As this court has noted before and notes here again, genuine issues of material fact exist  
11 regarding citizenship, and therefore, it was error for the immigration court to decide the matter and  
12 its decision is non-binding. Whether or not the immigration court itself realized that there were  
13 genuine issues of material fact to resolve is immaterial—this court holds that there were.<sup>4</sup>

### 14 3. 8 U.S.C. § 1452(a)

15 Third, plaintiff asserts that 8 U.S.C. § 1452(a) does not apply to him because he is not  
16 claiming derivative citizenship, rather, he claims he is a citizen by natural birth in Texas. (ECF  
17 No. 28 at 6). The court previously held that “[i]f a party wishes to affirmatively prove his  
18 citizenship through the attorney general, he must do so by filing an application for citizenship  
19 under 8 U.S.C. § 1452(a). (ECF No. 26 at 7). Further, the court stated that “if the party’s  
20 application for citizenship is denied, and the party exhausted his administrative remedies, then the  
21 party can sue for a declaration of citizenship under 8 U.S.C. § 1503(a).” (ECF No. 26 at 7).

22 On this issue, plaintiff is correct and the court erred in its prior order. The plain language  
23 of § 1452 indicates to whom it applies: “a person who claims to have **derived** United States  
24 citizenship . . . .” 8 U.S.C. § 1452 (emphasis added). Therefore, plaintiff is correct that 8 U.S.C.

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26 <sup>3</sup> In its entirety, the footnote reads: *See Ng Fung Ho v. White*, [259 U.S. 276, 284, 42 S.Ct. 492, 66 L. Ed. 938 \(1922\)](#); *Chau v. INS*, 247 F.3d 1026, 1027-28 (9th Cir. 2001).

27 <sup>4</sup> Much of the immigration court’s decision relied on findings of credibility and a rejection  
28 of the government’s evidence. Thus, the immigration court’s decision constituted a *resolution* of  
genuine issues of material fact, not a determination that no genuine issue existed. Regardless, this  
court now holds that genuine issues of material fact did exist then and still exist now.

1 § 1452(a) does not apply to him, as it applies only to those seeking to prove *derivative* citizenship.  
2 To the extent that this court’s prior order can be read to imply that a party claiming to be a natural-  
3 born citizen can and must rely on 8 U.S.C. § 1452(a) to seek a declaration of citizenship, this was  
4 error. 8 U.S.C. § 1452(a) does not apply to those claiming to be natural-born citizens.

5 Nonetheless, any error was harmless as to the motion for summary judgment. Regardless  
6 of the applicability of 8 U.S.C. § 1452(a), plaintiff has still not conclusively demonstrated, after  
7 construing all reasonable inferences in the record in favor of the government, that there are no  
8 genuine issues of material fact and that he was born in the United States by a preponderance of the  
9 evidence. Although the court recognizes that 8 U.S.C. § 1452(a) is not an obstacle to his ability  
10 to prove his citizenship, he still must prove that he is a citizen. Genuine issues of fact remain with  
11 this question.

#### 12 **4. Issue preclusion**

13 Fourth, plaintiff re-asserts his argument that issue preclusion applies and that “defendants  
14 may not relitigate these issues and are barred from contesting the plaintiff’s U.S. citizenship by  
15 the doctrine of collateral estoppel.” (ECF No. 28 at 10). To succeed with a motion for  
16 reconsideration, a party must demonstrate one of three things: (1) newly discovered evidence; (2)  
17 that the court committed clear error or the initial decision was manifestly unjust; or (3) if there is  
18 an intervening change in controlling law. *School Dist. No. 1J*, 5 F.3d at 1263; LR 59-1. These  
19 are the only arguments permissible on reconsideration. One must not repeat old arguments:  
20 “Motions for reconsideration are disfavored. A movant must not repeat arguments already  
21 presented unless (and only to the extent) necessary to explain controlling, intervening law or to  
22 argue new facts. A movant who repeats arguments will be subject to appropriate sanctions.” LR  
23 59-1(b) (emphasis added). And one must not conjure up new arguments other than the three  
24 permissible arguments permissible on reconsideration. *See Kona Enters., Inc.*, 229 F.3d at 890.

25 Plaintiff presents the same argument he raised in his motion for summary judgment—  
26 collateral estoppel applies. He also argues—as he has before—that he is a citizen by birthright.  
27 As plaintiff made these arguments before, they are inappropriate for reoncisderation.  
28

1 Plaintiff further argues that this court must defer to the attorney general's determinations  
2 of citizenship, which includes an immigration court's determination. This is an argument plaintiff  
3 made in passing before. (ECF No. 18-1 at 14). But to the extent that it is a new argument, it has  
4 no bearing on reconsideration. *Kona Enters., Inc.*, 229 F.3d at 890.

5 Even if this court generously construed plaintiff's arguments as arguments that the court  
6 committed "clear error" or "manifest injustice," plaintiff's arguments still fail because this court's  
7 original decision on collateral estoppel was correct. In general, a prior determination of fact or  
8 law in another tribunal will bind this court only if the prior court considered the issues under the  
9 same legal standard that applies here: "relitigation of an issue is not precluded unless the facts *and*  
10 *the legal standard* used to assess them are the same in both proceedings." *Amrollah v. Napolitano*,  
11 710 F.3d 568, 571 (5th Cir. 2013) (quoting *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 290 (5th  
12 Cir. 2005) (en banc)). The legal standard in this case is quite different—indeed, almost the  
13 opposite—from that applicable to the immigration proceeding.

14 8 U.S.C. § 1503 and 28 U.S.C. § 2201 govern this proceeding. This court will declare  
15 plaintiff a United States citizen only if he proves by a preponderance of the evidence that he is, in  
16 fact, a citizen of the United States. *Yu Tang Gay v. Rusk*, 290 F.2d 630, 631 (9th Cir. 1961).

17 In plaintiff's immigration removal proceeding, however, the burden was flipped. The  
18 immigration court was only to decide whether the *government* had proven by clear and convincing  
19 evidence that plaintiff was *not* a United States citizen—indeed, plaintiff did not need to  
20 affirmatively prove that he was a United States citizen by any standard, as he must here.

21 Moreover, the immigration court was simply barred from deciding the citizenship of the  
22 respondent because a genuine issue of material fact existed (and exists now) over the question of  
23 plaintiff's citizenship. While a party can raise a defense of citizenship in the context of a removal  
24 proceeding, "if the immigration judge accepts the citizenship defense, [the immigration judge]  
25 terminates the removal proceedings *without deciding citizenship*." *Rios-Valenzuela v. Dep't of*  
26 *Homeland Sec.*, 506 F.3d 393, 396–97 (5th Cir. 2007).

27 Therefore, collateral estoppel does not apply here for multiple reasons: this court is  
28 applying a different standard to the questions at hand than the immigration court did, and the

1 immigration court's determination of citizenship was not necessary to the resolution of the issue  
2 before it (indeed, it was barred from making that determination). The immigration judge did not  
3 need to find by a preponderance of evidence that plaintiff was born in the United States in order  
4 to determine that the government had failed to prove by clear and convincing evidence that he was  
5 born in Mexico; the immigration judge needed only to be unconvinced by the government's  
6 evidence. Here, on the other hand, plaintiff must affirmatively prove he is a United States citizen  
7 by a preponderance of evidence.

8 Therefore, to be abundantly clear about the meaning of this order, the questions of  
9 plaintiff's citizenship and place of birth are open for this court to decide upon an independent  
10 presentation of evidence to this court, and this court will not rely on the immigration judge's  
11 answers to those questions.

#### 12 **5. Newly discovered evidence**

13 Plaintiff—for the first time in his reply to his reconsideration motion—urges the court to  
14 reverse its order because “defendant relied on inaccurate information when it opposed plaintiff's  
15 motion for summary judgment.” (ECF No. 33 at 3). Plaintiff alleges that the government was  
16 aware of an April 15, 2016 report by the Texas Office of Inspector General that concluded “the  
17 allegations the midwife filed an alleged fraudulent Texas Certificate of Birth is unsubstantiated”  
18 and thus was aware of this fact when the government wrote its opposition to summary judgment.  
19 (ECF No. 33 at 6); (ECF No. 33-5 at 3).

20 A motion for reconsideration “may not be used to raise arguments . . . for the first time  
21 when they could reasonably have been raised earlier in litigation.” *Kona Enters., Inc.*, 229 F.3d at  
22 890. Plaintiff's reply is the first time he mentions these alleged facts and their implications. (ECF  
23 No. 33). Further, he has not convinced the court that the purported “new” evidence was  
24 unavailable to him at the time of the original motions for summary judgment or that it was not  
25 readily discoverable.

26 Plaintiff argues that the report was published on April 15, 2016, and therefore, the  
27 government was aware of the report before it filed its response on October 3, 2016. However,  
28 simply because the report was generated before the government submitted its response does not

1 prove that the government was actually aware of it. Further, plaintiff claims that he did not  
2 personally receive a copy of this document until July 1, 2017, and the same day, sent it to the  
3 government. (ECF No. 33 at 3). This was long after the government responded to plaintiff's  
4 motion for summary judgment. Further, that date cannot be correct because it falls a month after  
5 plaintiff filed his reply in the instant matter in which he discusses this very report. (ECF No. 33).  
6 In other words, plaintiff discussed this report a month before he purportedly received it. (ECF No.  
7 33). Plaintiff must have received this evidence sometime before, but has not accurately told the  
8 court when. Whatever the case, plaintiff has not convinced this court that this information was  
9 unavailable to him or not readily discoverable when he filed his September 8, 2016 motion for  
10 summary judgment. (ECF No. 18).

11 Even if the "July 1, 2017" was a typographical error, and plaintiff meant to write "July 1,  
12 2016," (*see* ECF No. 4), that only furthers the conclusion that this information was available or  
13 readily discoverable before plaintiff filed his September 8, 2016 motion for summary judgment.  
14 (ECF No. 18).

15 Accordingly, plaintiff has not shown that the new evidence was unavailable to him or was  
16 not readily discoverable at the time he filed his motion for summary judgment. *Kona Enters., Inc.*,  
17 229 F.3d at 890.

18 And regardless, even if this court considered this new evidence, genuine issues of material  
19 fact exist regarding plaintiff's citizenship because, among other things, there exists a Mexican birth  
20 certificate in the record that conflicts with plaintiff's United States birth certificate. Although  
21 plaintiff has provided an explanation for this conflict—as has the government—whether this court  
22 will accept one explanation over the other remains a genuine issue of material fact for trial.

### 23 **6. Conclusion of plaintiff's motion for reconsideration**

24 Therefore, the court will deny plaintiff's motion for reconsideration because he failed to  
25 show why the court should grant his motion.

### 26 **B. The government's counter-motion for reconsideration**

27 The government's cross-motion for reconsideration urges the court to grant summary  
28 judgment for the defense and to dismiss plaintiff's case in its entirety. *See* (ECF No. 32). The



1 government asserts that it is entitled to relief because “plaintiff has established no evidence to rebut  
2 the presumption that he was born in Mexico.” (ECF No. 32 at 9). However, this argument is not  
3 actually a motion for reconsideration, but is instead a late-filed motion for summary judgment.  
4 (*See* ECF No. 17 at 2). A review of the docket shows that the government has never moved for  
5 summary judgment before in this case, despite its claims to the contrary in the instant “cross-  
6 motion for reconsideration.” The government’s “opposition to plaintiff’s motion for summary  
7 judgment” was not a motion or counter-motion for summary judgment, despite the fact that it asked  
8 the court to grant summary judgment in the government’s favor, but was instead simply a response  
9 to plaintiff’s motion for summary judgment. (ECF No. 22). Here is why.

10 First, the document was not titled a motion or countermotion for summary judgment, it was  
11 titled only “Defendants’ opposition to plaintiff’s motion for summary judgment.” *Id.* The request  
12 for summary judgment was buried within the text of the brief, where the government explains why  
13 it is entitled to summary judgment. But it never actually filed a motion asking for that relief.

14 Second, more importantly, even if the document *had* styled itself an “opposition *and*  
15 countermotion for summary judgment,” the court would have rejected the countermotion  
16 nonetheless. In the federal district of Nevada,

17 For each type of relief requested or purpose of the document, a separate document  
18 must be filed and a separate event must be selected for that document. Examples:  
19 (i) separate documents must be filed for a response to a motion and a  
20 countermotion, with the appropriate event selected for each document, rather than  
filing a response and a countermotion in one document; (ii) separate documents  
must be filed for a motion to dismiss and a motion to sever, rather than filing a  
motion to dismiss and to sever in one document.

21 LR IC 2-2(b). Therefore, the government has never properly moved for summary judgment.

22 As explained above, a motion for reconsideration is limited to requesting that the court  
23 reconsider a decision it has already made in a prior order—it is not a vehicle for entirely new  
24 requests for relief. As the defense has not moved for summary judgment before, this court will  
25 not consider this relief now, for the first time on reconsideration.<sup>5</sup>

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28 <sup>5</sup> Nevertheless, note that this court has repeatedly held that genuine issues of material fact  
exist that must be resolved at trial.

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